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No. 98-1954

IN THE

Supreme Court of the United States

LOCAL UNION 1393, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a discharge grievance is subject to arbitration under a collective bargaining agreement containing a grievance and arbitration clause which expressly excludes from arbitration grievances over management's decision to discipline or discharge employees, subject only to any limitations in the agreement, and containing a "cause" limitation on the employer's right to terminate seniority, but no similar language concerning the employer's right to terminate employment.

STATEMENT PURSUANT TO RULE 29.6 OF THE SUPREME COURT OF THE UNITED STATES

Respondent, Utilities District of Western Indiana Rural Electric Membership Cooperative, is a non-stock, Indiana rural electric membership corporation, owned by its members. There is no parent or publicly held company owning 10% or more of the Respondent corporation.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the United States Court of Appeals for the Seventh Circuit, with the exception of amici curiae, appear in the caption to this Petition.

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Utilities District of Western Indiana Rural Electric Membership Cooperative respectfully submits its Brief in Opposition to Petition for Writ of Certiorari filed by Local Union 1393, International Brotherhood of Electrical Workers, AFL-CIO and requests the Court to deny review of the decision of the United States Court of Appeals for the Seventh Circuit entered herein on February 12, 1999.

CITATIONS TO OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is officially reported at 167 F.3d 1181 (7th Cir. 1999) and appears in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 1a-8a.[1] The decision of the United States District Court for the Southern District of Indiana is not published in either an official or unofficial reporter. It appears in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 9a-19a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court judgment was entered on February 12, 1999. The jurisdiction of this Court was invoked by Petitioner under 29 U.S.C. § 1254(1). The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule states, in relevant part, "A petition for a writ of certiorari will be granted only for compelling reasons." Inasmuch as the Seventh Circuit Court of Appeals correctly construed the

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1. References to the Appendix to the Petition for Writ of Certiorari will be as follows: "Pet. App. __."

collective bargaining agreement at issue consistent with this Court's precedent and not in conflict with decisions in other circuits, there are no compelling reasons to grant the petition, and it should be denied.

STATEMENT OF THE CASE

A. The Facts and the Jurisdiction of the District Court.

The jurisdiction of the District Court was invoked under 29 U.S.C. § 185(a) (jurisdiction over disputes arising under collective bargaining agreements). In the District Court, Petitioner, Local Union No. 1393, International Brotherhood of Electrical Workers, AFL-CIO ("Local 1393") filed a complaint against the Respondent, Utilities District of Western Indiana Rural Electric Membership Cooperative ("UDWI"), to compel arbitration under a collective bargaining agreement of a grievance over UDWI's discharge of a bargaining unit employee. (Pet. App. 9a.)

Local 1393 and UDWI are parties to a collective bargaining agreement ("CBA") effective July 1, 1994, governing the terms and conditions of employment of UDWI's production, maintenance, and construction employees. (Pet. App. 10a.)

Article III of the CBA provides for a grievance and arbitration procedure. Section one of that Article reads:

> [a]ny differences arising between an employee or a group of employees within the bargaining unit as to the cooperative's interpretation or application of this Agreement or any of its terms or conditions may constitute a grievance if the

> following procedure is timely instituted and complied with by the Union: . . . .

(Pet. App. 10a.) The first step in the process involves the concerned employees, the Union Steward, and the supervisor discussing the grievance. (Pet. App. 10a.) If the grievance is not settled within seventy-two hours of that meeting, the second procedural step is to reduce the grievance to writing and submit it to the Cooperative's Manager within fifteen days from the alleged grievance. (Pet. App. 10a.) When a grievance is not resolved within twenty days of being reduced to writing, the grievance may proceed to the third step, which allows the Business Manager of the Union to demand arbitration. (Pet. App. 10a-11a.) However, according to the CBA, at the second step, "[a] decision by the Cooperative's Manager shall be final upon questions of management and matters retained by the employer as provided in 5 of Article II" and should, therefore, not be subject to arbitration. (Pet. App. 11a.) The third step of the procedure begins, "[h]owever, as to any other questions involved in the grievance upon which such decision shall have been rendered as above provided, the Business Manager of the Union may demand arbitration. . . ." (Pet. App. 11a-12a.)

Section five of Article II of the CBA is a management rights clause, which is referenced in step two of the grievance procedure, and provides:

> Subject only to any limitations contained in this Agreement, the Union recognizes and agrees that the Employer retains exclusive rights to hire, discharge, layoff, promote, demote and discipline its employees; to assign tasks, places

> and times of work; to determine the methods and means by which its operations are to be carried on; to direct the performance of work and to provide for the conduct of the operations in a safe and effective manner.

(Pet. App. 11a.)

Article V of the CBA then outlines the rules governing employee seniority and states that seniority "refer[s] to and include[s] the total length of continuous service of an employee with the Employer." (Pet. App. 11a-12a.) Section four of Article V provides, in relevant part, that service by an employee "shall be considered broken and seniority rights shall not be restored to a regular employee who: (1) voluntarily terminates his employment; (2) is discharged for cause. . . ." (Pet. App. 12a.)

B. Proceedings Below.

On January 28, 1998, the parties each filed summary judgment motions. UDWI argued that under the agreed provisions of the CBA, the Cooperative's Manager has the final decision upon grievances concerning employee discharge; that an implied "just cause" provision would be at odds with the CBA's express provisions; and that the seniority provisions are not a limitation in this CBA upon UDWI's right to discharge an employee.

On May 19, 1998, the District Court denied Local 1393's motion for summary judgment and granted UDWI's summary judgment motion. The District Court found controlling the language in the management rights clause that "the Employer retains the exclusive rights to . . .

discharge . . . and discipline." The District Court concluded the "arbitration and grievance procedure specifically exempted [the right to discharge] from having to be subject to arbitration." (Pet. App. 17a.) Furthermore, the District Court found the seniority provision of Article V could not be read as limiting the employer's right to discharge under the management rights clause. According to the District Court:

> The right to discharge and the right to end an employee's seniority are two different rights. Seniority refers to the continuous service of an employee and is a factor the employer takes into account when making employment decisions . . . [S]eniority is not coterminous with employment.

(Pet. App. 16a.)

On May 28, 1998, Local 1393 filed its Notice of Appeal to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). On February 12, 1999, the Seventh Circuit affirmed the decision of the District Court. (Pet. App. 1a-2a.)

The Seventh Circuit held that the seniority rights clause cannot be considered an express limitation on the right of the employer to terminate employees because a termination of employment does not necessarily also terminate seniority and, therefore, violate the seniority rights clause of the CBA. (Pet. App. 6a.) The Seventh Circuit further held that "the right to seniority and the right to continued employment are distinct concepts that the parties to a CBA may choose to treat separately." (Pet. App. 6a.)

According to the Seventh Circuit, no "just cause" limitation should be implied because the terms of this management rights clause clearly state that UDWI possesses plenary authority over discharge decisions and the grievance and arbitration clause precludes arbitration of claims related to termination. (Pet. App. 6a-7a.) Based upon these provisions, the Seventh Circuit concluded a "just cause" requirement should not be implied; the employer's decision to terminate should be given final effect; and the presumption in favor of arbitrability is inapplicable because the meaning of this CBA is clear and not susceptible to the interpretation that UDWI is obligated to arbitrate discharge grievances. (Pet. App. 7a.)

On February 24, 1999, Local 1393 filed with the Seventh Circuit a petition for rehearing and suggestion for rehearing *en banc*. On March 10, 1999, the Seventh Circuit denied the petition for rehearing. (Pet. App. 20a-21a.)

REASONS FOR DENYING THE WRIT

The Seventh Circuit's decision is not in conflict with decisions rendered by the Eighth and Ninth Circuits. It also does not create a split in the Circuits concerning the proper interpretation of collective bargaining agreements which contain a "cause" limitation on the employer's right to terminate seniority but no similar limitation on the employer's right to terminate employment. The decisions Local 1393 has cited involved enforcement of arbitrators' awards, not suits to compel arbitration. Notwithstanding the strong federal policy favoring arbitration of labor disputes, arbitration is a matter of contract. Given the terms of this CBA, the Seventh Circuit properly concluded UDWI was not required to arbitrate a dispute it had not agreed to submit to arbitration.

The Seventh Circuit's decision is not contrary to the decisions of this Court favoring arbitration and creating a presumption in favor of arbitrability. The Seventh Circuit properly considered the policy favoring arbitration when it reviewed the provisions of the collective bargaining agreement and found the agreement expressly excluded discharge grievances from arbitration and was, therefore, not susceptible to an interpretation that such grievances were arbitrable. Consequently, the Court should deny the Petition for Writ of Certiorari.

I. THIS COURT SHOULD DENY THE WRIT BECAUSE PETITIONER RELIES ON EIGHTH AND NINTH CIRCUIT DECISIONS WHICH ARE INAPPLICABLE AND THERE IS NO SPLIT IN THE CIRCUITS.

Local 1393 attempts to create conflict where none exists by citing decisions from the Eighth and Ninth Circuits. In doing so, Petitioner urges this Court to decide that termination of seniority under a collective bargaining agreement is concomitant with termination of employment in cases where the issue is whether a discharge grievance is arbitrable. However, the two cited decisions do not support Local 1393's proposition. Both cases involved a suit to enforce an arbitrator's award. They were not suits to compel arbitration. Although related, these two actions are distinguishable. In an action to enforce an arbitrator's decision, the issue before the reviewing court is typically whether the arbitrator exceeded his or her broad range of authority. The issue in this cause, however, is whether the parties to the collective bargaining agreement agreed to submit this particular matter to arbitration.

Arbitrators are given wide deference by the courts once it has been determined the issue is arbitrable, so long as the arbitrator's decision draws its essence from the agreement, *Jasper Cabinet Co. v. United Steelworkers of America, AFL-CIO-CLC, Upholstery and Allied Division*, 77 F.3d 1025, 1028-29 (7th Cir. 1996), but giving an arbitrator broad discretion because of his or her knowledge of industry practices does not mean our courts will disregard the express terms of a collective bargaining contract. *Truck Drivers, Union Local 705 v. Schneider Tank Lines*, 958 F.2d 171, 172-173 (7th Cir. 1992).

Local 1393 cites *SFIC Properties v. International Assn. of Machinists and Aerospace Workers, Dist. Lodge 94*, 103 F.3d 923 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 80 (1997), in which the Ninth Circuit reversed the District Court's decision and upheld an arbitrator's award. Unlike this action, *SFIC Properties* was not a case to compel arbitration. Petitioner erroneously asserts that in *SFIC Properties*, the Ninth Circuit approved of the arbitrator inferring a just cause requirement for discharge. What the Ninth Circuit did was acknowledge this was what the arbitrator did. The Ninth Circuit simply held that the arbitrator's award should not be vacated because the award drew its essence from the collective bargaining agreement. *SFIC Properties*, 103 F.3d at 925.

The Ninth Circuit in *SFIC Properties* stated the law concisely by acknowledging that a reviewing court, in a suit to enforce an arbitration award, is bound under all except the most limited circumstances to defer to the decision of the arbitrator, even if that decision finds the facts and states the law erroneously. *SFIC Properties*, 103 F.3d at 924-925. The Ninth Circuit went on to identify three

exceptions to this general rule of deference: "(1) when the award does not 'draw its essence from the collective bargaining agreement'; (2) when the arbitrator exceeds the scope of the issue submitted; and (3) when an award runs counter to public policy." *SFIC Properties*, 103 F.3d at 925. The Ninth Circuit then upheld the arbitrator's award because it found the award drew its essence from the CBA even though not based on the language in the CBA, but rather, on the arbitrator's understanding of industry practices. *SFIC Properties*, 103 F.3d at 925-926. According to Local 1393, the Ninth Circuit noted that "it is very common . . . to infer just cause requirements from CBA's which are silent on the issue . . ." (Pet. at 9), but what the Ninth Circuit actually said was that "[a]s it is very common for *arbitrators* to infer just cause requirements from CBA's which are silent on the issue, the award in the instant matter drew its essence from the CBA between SFIC and the union." *SFIC Properties*, 103 F.3d at 926 (emphasis added). The Ninth Circuit did not state it is very common or should be common for our courts to infer just cause requirements when asked to decide whether to compel arbitration of a particular discharge dispute.

Although the Ninth Circuit effectively acknowledged the well settled principle from arbitration decisions that a limitation on an employer's right to terminate an employee's seniority is tantamount to a limitation on its right to discharge, such an acknowledgment is inapplicable to the case before this Court. What an arbitrator can do in deciding a dispute and what a court can do in deciding whether a dispute is arbitrable, are two distinctly different issues. An arbitrator's decision will be upheld if it draws its essence from the contract and will not be overturned unless the arbitrator exceeds his or her broad authority to interpret

collective bargaining agreements. *SFIC Properties*, 103 F.3d at 924-925. In contrast, courts which are asked to decide whether a dispute is arbitrable must look to the contract and, if it is unambiguous, enforce its terms. *See Schneider Tank Lines*, 958 F.2d at 172 (in interpreting a labor contract, the court, unlike an arbitrator, is more narrowly bound by the rules of contract interpretation); *Alexander v. City of Evansville*, 120 F.3d 723, 727 (7th Cir. 1992) (where a collective bargaining agreement is unambiguous, the court should not resort to extrinsic evidence to interpret the agreement); *International Bhd. Of Teamsters, Local Union No. 371 v. Logistical Support Group*, 999 F.2d 227, 229 (7th Cir. 1993) (implied terms must give way to express provisions contained in the parties' collective bargaining agreement).

Local 1393 also cites *Excel Corp. v. United Food and Commercial Workers International Union, Local 431*, 102 F.3d 1464 (8th Cir. 1996) to support its position that courts, in interpreting collective bargaining agreements to determine if a dispute is arbitrable, are required to imply a just cause requirement from a seniority provision. Again, the cited case involved a suit to vacate an arbitrator's award, not a suit to compel arbitration. The Eight Circuit upheld the lower court's decision vacating the award because the arbitrator ignored the CBA language and because the award did not draw its essence from the agreement. Local 1393 mischaracterizes the holding when it states that the Eighth Circuit "noted that the arbitrator properly resolved '[t]he only ambiguity . . . in the language of the seniority provision . . . i.e., that "loss of seniority" means termination.' " (Pet. at 11, *citing Excel*, 102 F.3d at 1470) What the Eighth Circuit actually noted was that the ambiguity was found by the arbitrator. The crucial distinction Local 1393 fails to

mention in regard to *Excel* is that the management rights clause contained a requirement that management only discipline or discharge "for cause" and, therefore, there was no question of whether the arbitrator should imply a just cause requirement in the contract. *Excel*, 102 F.3d at 1470. The management rights clause in *Excel* specifically contained a "for cause" requirement in regard to management's right to discharge. The CBA in the present case, however, contains no such express "for cause" language in its management rights clause in regard to management's right to discharge.

The settled expectations of the parties are contained in the agreed terms of the CBA. No ambiguity exists which would allow an inference that the seniority provision implies a just cause requirement for discharge of an employee. The Seventh Circuit simply upheld the integrity of labor agreements because it based its holding on the express terms of the parties' distinct collective bargaining agreement. The Seventh Circuit's decision is consistent with this Court's holding that the presumption in favor of arbitration is not applicable where the arbitration clause is not susceptible of an interpretation that it covers the asserted dispute and no ambiguities exist. *AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).

By its holding, the Seventh Circuit did not create a split in the circuits. Its decision poses no threat to the orderly administration of justice and does not call for resolution by the Court.

II. THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The Court has enunciated three general principles in regard to whether the parties to a collective bargaining agreement have agreed to arbitrate their disputes. First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit." *AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Second, whether a collective bargaining agreement creates a duty to arbitrate a particular grievance is an issue for judicial determination. *AT & T Technologies Inc.*, 475 U.S. at 643. Third, there is a presumption in favor of arbitration when a collective bargaining agreement contains an arbitration clause; however, a court should not order arbitration if the arbitration clause is not susceptible of an interpretation that it covers the asserted dispute. *AT & T Technologies Inc.*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83).

With these principles in mind, the Seventh Circuit in the present case upheld the District Court's decision to not compel arbitration because this CBA is clear and not susceptible to an interpretation that the arbitration provision covers employee discharge disputes. (Pet. App. 7a.) Although the Seventh Circuit agreed with Local 1393 that the grievance clause of the CBA is very broad, the court also found its scope was expressly limited by the provision in that clause that "[a] decision by the Cooperative's Manager shall be *final* upon questions of management and

matters retained by the employer as provided in [Section] 5 of Article II." (Pet. App. 5a.) The court further supported its decision with the language in Section 5 of Article II — the management rights clause — which provides that "[s]ubject only to any limitations contained in this Agreement . . . the Employer retains the *exclusive* rights to . . . discharge and discipline." (Pet. App. 5a.)

Local 1393 attempts to show this management rights clause is less sweeping than that found in *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 363 U.S. 574 (1960), but the provision Local 1393 cited indicating, "matters which are strictly a function of management shall not be subject to arbitration under this section" was contained in the grievance procedure of that collective bargaining agreement, not the management rights clause. *Warrior & Gulf*, 363 U.S..at 576. Also, *Warrior & Gulf* would have been decided differently, according to the Court, if the exclusions from arbitration were stated with specificity. *Warrior & Gulf*, 363 U.S. at 584-585. The Court held:

> Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting out. In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Warrior & Gulf, 363 U.S. at 584-85.

Unlike *Warrior & Gulf*, the grievance and arbitration clause in this CBA *expressly* excludes those matters found in the management rights clause from arbitration, and the management rights clause specifically provides that, subject only to any limitations contained in the agreement, UDWI retained the exclusive right to discharge and discipline its employees. (Pet. App. 5a.) Since there is no express limitation in the agreement upon UDWI's exclusive right to discharge an employee, this exclusion satisfies the principles the Court enunciated in *Warrior & Gulf* and rebuts the presumption favoring arbitration.

Local 1393 argues that the seniority provision of the CBA is a limitation on the right of UDWI to discharge an employee because "it is entirely natural and consistent with recognized labor law principles" that a seniority rights clause limitation on breaking seniority only for "cause" also limits the right to discharge. (Pet. 16-17.) The Seventh Circuit, while acknowledging the management rights clause should not be considered apart from the remainder of the agreement and that implied terms may give this provision a narrower scope, held that "implied restrictions must be grounded in a provision of the CBA that is expressly addressed to the dispute the union seeks to arbitrate." (Pet. App. 5a-6a.) The CBA in the present case contains no express provisions limiting management's right to discipline or discharge except for "just cause."

The Seventh Circuit held that the seniority rights clause was not an express limitation because the right to seniority and the right to continued employment are distinct concepts that the parties to this CBA chose to treat separately. (Pet. App. 6a.) Further, the court held that the seniority provision could not create an implied "just cause" limitation

because the CBA clearly stated UDWI retained the *exclusive* right to discharge and discipline employees. (Pet. App. 6a.) Local 1393 wants the Court to ignore the plain language of the CBA and find that employment and seniority are one and the same, notwithstanding that the parties addressed each separately. Seniority confers rights during employment, such as the right to overtime or choice of jobs, which are rights distinct from continued employment. Under this CBA, an employee could be terminated and rehired before a twelve month break in service. In that case, assuming the termination was not for cause, the employee would return to work without losing his years of seniority. If on the other hand, the termination was "for cause" and the employee was rehired before a twelve month break in service, the employee would not maintain his years of seniority. In that instance, and only that instance, could the employee seek arbitration if he were rehired, but refused his seniority status, to determine if his discharge was for "just cause".

The Seventh Circuit's interpretation of the CBA is consistent with this Court's long-standing precedent and as such, this Court should decline to hear this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied, and the Seventh Circuit's opinion should be upheld.

Respectfully submitted,

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